IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE PENFIELD COMPANY OF CALIFORNIA, a corporation,
Appellant,
v.
SECURITIES AND EXCHANGE COMMISSION,
Appellee.

No. 10487

BRIEF FOR APPELLEE

ROGER S. FOSTER,
Solicitor.
MILTON V. FREEMAN,
Assistant Solicitor.
LOUIS LOSS,
Special Counsel.
SECURITIES & EXCHANGE COMMISSION,
18th and Locust Streets,
Philadelphia 3, Pa.
CHARLES J. ODENWELLER, JR.,
Regional Administrator.
SECURITIES & EXCHANGE COMMISSION,
1370 Ontario Street,
Cleveland 13, Ohio.

The Legal Intelligencer, 222 N. 15th St., Phila. 2.

CONTENTS

	Page
Statement of jurisdiction	1
Statute involved	2
Facts	4
Questions presented	7
Argument	8
I. The Act authorizes the enforcement of the subpœna without a determination that the appellant has used the mails or an instrumentality of interstate commerce in the sale of a security	8
II. In any event there are reasonable grounds to believe that the appellant has used the mails and has done so in the sale of a "security"	18
III. The subpœna is valid in form and content	28
A. The Act does not require the Commission to make a formal finding that in its opinion the evidence required is necessary for the proper enforcement of the Act and relevant or material to the Commission's inquiry	28
B. The evidence required is in fact relevant to the investigation	30
IV. The subpœna does not involve a violation of the Fourth Amendment	32
V. The investigatory provisions of the Act do not involve an unconstitutional delegation of judicial power	34
Conclusion	37

CITATIONS

Cases: Page

Atherton v. *United States*, 128 F. (2d) 463 (C. C. A. 9, 1942) 22, 23, 25, 26, 27, 28

Baltimore & Ohio R. R. Co. v. *Interstate Commerce Commission*, 221 U. S. 612 (1911) 33

Blair v. *United States*, 250 U. S. 273 (1919) 13

Boyd v. *United States*, 116 U. S. 616 (1886) 17, 33

Bradley Lumber Co. v. *National Labor Relations Board*, 84 F. (2d) 97 (C. C. A. 5, 1936) 17

Cobbledick v. *United States*, 309 U. S. 323 (1940) 15

Commonwealth v. *Sofield*, 38 Dauphin County Rep. (Pa.) 233 (1933) 23

Consolidated Mines of California v. *S. E. C.*, 97 F. (2d) 704 (C. C. A. 9, 1938) 13, 14, 18, 32, 33, 35

Coplin v. *United States*, 88 F. (2d) 652 (C. C. A. 9, 1937), *cert. denied*, 301 U. S. 703 (1937) 34

Cudahy Packing Co. v. *Fleming*, 122 F. (2d) 1005 (C.C.A. 8, 1941), *reversed on other grounds, Cudahy Packing Co.* v. *Holland*, 315 U. S. 785 (1942) 11, 33

Cudahy Packing Co. v. *Holland*, 315 U. S. 357 (1942) .. 11, 17

Cudahy Packing Co. v. National Labor Relations Board, 117 F. (2d) 692 (C. C. A. 10, 1941) 15

Cudahy Packing Company of Louisiana, Ltd., v. *Fleming*, 119 F. (2d) 209 (C. C. A. 5, 1941), *reversed on other grounds, Cudahy Packing Company of Louisiana, Ltd.*, v. *Holland*, 315 U. S. 357 (1942) 11

Domestic & Foreign Petroleum Co. v. *Long*, 4 Cal. (2d) 547, 51 P. (2d) 73 (1935) 22

Ellis v. *Interstate Commerce Commission*, 237 U. S. 434 (1915) 17

Endicott-Johnson Corp. v. *Perkins*, 317 U. S. 501 (1943) 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 28, 36

CITATIONS—*Continued*

Page

Essgee Co. of China v. *United States*, 262 U. S. 151 (1923) 33

Federal Power Commission v. *Metropolitan Edison Co.*, 304 U. S. 375 (1938) 16

Federal Trade Commission v. *American Tobacco Co.*, 264 U. S. 298 (1924) 17

Fenton v. *Walling*, 139 F. (2d) 608 (C. C. A. 9, 1943) 13

Fleming v. *Bank of America National Trust & Savings Ass'n*, 5 Wage Hour Rep. 242 (N. D. Cal. 1942) 12

Fleming v. *G. & C. Novelty Shoppe, Inc.*, 35 F. Supp. 829 (N. D. Ill. 1940) 12

Fleming v. *Howard A. Davidson Lumber Co.*, 3 Wage Hour Rep. 526 (E. D. Mich., Nov. 25, 1940) 12

Fleming v. *Lowell Sun Co.*, 36 F. Supp. 320 (D. Mass. 1940), *reversed on other grounds, Lowell Sun Co.* v. *Fleming*, 120 F. (2d) 213 (C. C. A. 1, 1941), *affirmed*, 315 U. S. 784 (1942) 12

Fleming v. *Minnesota Mines, Inc.*, 4 Wage Hour Rep. 563 (D. Colo., July 18, 1941), *reversed on other grounds, Minnesota Mines, Inc.*, v. *Holland*, 126 F. (2d) 824 (C. C. A. 10, 1942) 12

Fleming v. *Montgomery Ward & Co.*, 114 F. (2d) 384 (C. C. A. 7, 1940), *cert. denied*, 311 U. S. 690 (1940) 11, 19

General Tobacco and Grocery Co. v. *Fleming*, 125 F. (2d) 596 (C. C. A. 6, 1942) 11, 12, 18, 19

Goodyear Tire & Rubber Co. v. *National Labor Relations Board*, 122 F. (2d) 450 (C. C. A. 6, 1941) 15

Guaranty Underwriters, Inc., v. *S. E. C.*, 131 F. (2d) 370 (C. C. A. 5, 1942) 16

Hale v. *Henkel*, 201 U. S. 43 (1906) 17

CITATIONS—*Continued*

Page

Harriman v. *Interstate Commerce Commission*, 211 U. S. 407 (1908) 17

Holland, Application of, 44 F. Supp. 601 (S. D. N. Y. 1942), *affirmed, Walling* v. *Standard Dredging Corp.*, 132 F. (2d) 322 (C. C. A. 2, 1943), *cert. denied*, 319 U. S. 761 (1943) 10

Hollywood State Bank v. *Wilde*, unreported, Cal. Super. Ct. for Los Angeles, No. 478,973 (Aug. 11, 1943) ... 23

Howat v. *Kansas*, 258 U. S. 181 (1922) 13, 34

Interstate Commerce Commission v. *Brimson*, 154 U. S. 447 (1894) 35, 36

Johnson v. *McNeill*, —— Fla. ——, 10 So. (2d) 143 (1942) 16

Jones v. *S. E. C.*, 298 U. S. 1 (1936) 17, 33, 34

Kerst v. *Nelson*, 171 Minn. 191, 213 N. W. 904 (1927) .22, 23

Klatt v. *Guaranteed Bond Co.*, 213 Wis. 12, 250 N. W. 825 (1933) 22

Lewis v. *Creasey Corp.*, 198 Ky. 409, 248 S. W. 1046 (1923) 22

Lowell Sun Co. v. *Fleming*, 120 F. (2d) 213 (C. C. A. 1, 1941), *affirmed, Holland* v. *Lowell Sun Co.*, 315 U. S. 784 (1942) 33

Martin v. *Chandis Securities Co.*, 128 F. (2d) 731 (1942) . 16

Martin Typewriter Co. v. *Walling*, 135 F. (2d) 918 (C. C. A. 1, 1943) 10

McMann v. *Engel*, 16 F. Supp. 446 (S. D. N. Y. 1936), *affirmed, McMann* v. *S. E. C.*, 87 F. (2d) 377 (C. C. A. 2, 1937), *cert. denied*, 301 U. S. 684 (1937) 34

McMann v. *S. E. C.*, 87 F. (2d) 377 (C. C. A. 2, 1937), *cert. denied*, 301 U. S. 684 (1937) 33

CITATIONS—*Continued*

Page

Merger Mines Corp. v. *Grismer*, 137 F. (2d) 335 (C. C. A. 9, 1943), *cert. denied*, 88 L. Ed. (Adv. Op.) 155 (1943) 2

Mississippi Road Supply Co. v. *Walling*, 136 F. (2d) 391 (C. C. A. 5, 1943), *cert. denied*, 88 L. Ed. (Adv. Op.) 32 (1943) 10, 11, 16, 17

Moore v. *Stella*, 52 Cal. App. (2d) 766, 127 P. (2d) 300 (1942) 22

Myers v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938) 16, 17

National Labor Relations Board v. *Barrett Co.*, 120 F. (2d) 583 (C. C. A. 7, 1941) 11

National Mediation Board v. *Virginian Ry. Co.*, unreported, Pike and Fischer, Admin. Law, 44g.31-4 (E. D. Va., June 6, 1941) 11

National Supply Co. v. *Leland Stanford Junior University*, 134 F. (2d) 689 (C. C. A. 9, 1943), *cert. denied*, 88 L. Ed. (Adv. Op.) 43 (1943) 2

Newfield v. *Ryan*, 91 F. (2d) 700 (C. C. A. 5, 1937), *cert. denied*, 302 U. S. 729 (1937) 33, 34

Pacific Railway Commission, In re, 32 Fed. 241 (C. C. N. D. Cal. 1887) 34, 35, 36

People v. *White*, 124 Cal. App. 548, 12 P. (2d) 1078 (1932) 22

Perkins v. *Endicott-Johnson Corp.*, 128 F. (2d) 208 (C. C. A. 2, 1942), *affirmed, Endicott-Johnson Corp.* v. *Perkins*, 317 U. S. 501 (1943) 12, 13, 16, 17, 34, 36

President v. *Skeen*, 118 F. (2d) 58 (C. C. A. 5, 1941) .. 11, 13

Prohaska v. *Hemmer-Miller Development Co.*, 256 Ill. App. 331 (1930) 22, 24

S. E. C., In re, 84 F. (2d) 316 (C. C. A. 2, 1936) 13, 36

CITATIONS—*Continued*

Page

S. E. C. v. *Bailey,* 41 F. Supp. 647 (S. D. Fla. 1941) . . 22, 23

S. E. C. v. *Bourbon Sales Corp.,* 47 F. Supp. 70 (W. D. Ky. 1942) 4, 13, 18, 19, 20, 22, 32

S. E. C. v. *Clayton,* unreported, 1 S. E. C. Jud. Dec. 670 (D. D. C., March 16, 1939) 16

S. E. C. v. *C. M. Joiner Leasing Corp.,* 320 U. S. 344 (1943) 23, 24, 25, 26, 27, 28

S. E. C. v. *Crude Oil Corporation of America,* 93 F. (2d) 844 (C. C. A. 7, 1937) 21, 23, 34

S. E. C. v. *Cultivated Oyster Farms Corp.,* unreported, 1 S. E. C. Jud. Dec. 672, CCH Fed. Sec. Law Serv., par. 90,121 (S. D. Fla., No. 350, March 22, 1939) . . . 23

S. E. C. v. *Jones,* 79 F. (2d) 617 (C. C. A. 2, 1935), *reversed on other grounds, Jones* v. *S. E. C.,* 298 U. S. 1 (1936) 34

S. E. C. v. *Payne,* 35 F. Supp. 873 (S. D. N. Y. 1940) . . 22, 23

S. E. C. v. *Pyne,* 35 F. Supp. 988 (D. Mass. 1940) 22, 23

S. E. C. v. *Timetrust, Inc.,* 28 F. Supp. 34 (N. D. Cal. 1939) 22

S. E. C. v. *Tung Corporation of America,* 32 F. Supp. 371 (N. D. Ill. 1940) 19, 21, 23

S. E. C. v. *Universal Service Ass'n,* 106 F. (2d) 232 (C. C. A. 7, 1939), *cert. denied,* 308 U. S. 622 (1940) . . . 21, 22

S. E. C. v. *Wickham,* 12 F. Supp. 245 (D. Minn. 1935) . 21, 22

State v. *Agey,* 171 N. C. 831, 88 S. E. 726 (1916) 23

State v. *Evans,* 154 Minn. 95, 191 N. W. 425 (1922) 24

State v. *Gopher Tire & Rubber Co.,* 146 Minn. 52, 177 N. W. 937 (1920) 22

State v. *Heath,* 199 N. C. 135, 153 S. E. 855 (1930) 22

CITATIONS—*Continued*

Page

State v. *Robbins*, 185 Minn. 202, 240 N. W. 456 (1932) ... 23

Stevens v. *Liberty Packing Corp.*, 111 N. J. Eq. 61, 161 Atl. 193 (1932) ... 23

United States v. *Chemical Foundation, Inc.*, 272 U. S. 1 (1926) ... 16

United States v. *Clyde S. S. Co.*, 36 F. (2d) 691 (C. C. A. 2, 1929), *cert. denied*, 281 U. S. 744 (1930) ... 11

United States v. *Monjar*, 47 F. Supp. 421 (D. Del. 1942), *appeal pending* ... 22

Vercellini v. *U. S. I. Realty Co.*, 158 Minn. 72, 196 N. W. 672 (1924) ... 24

Walling, Application of, 49 F. Supp. 659 (D. N. J. 1943), *appeal pending, Walling* v. *News Printing Co., Inc.* (C. C. A. 3, No. 8443) ... 11, 12

Walling, Application of, 50 F. Supp. 560 (S. D. N. Y. 1943) ... 12

Walling v. *American Rolbal Corp.*, 135 F. (2d) 1003 (C. C. A. 2, 1943) ... 10, 32

Walling v. *Belikoff*, 3 F. R. D. 92 (S. D. N. Y. 1943) ... 12

Walling v. Benson, 137 F. (2d) 501 (C. C. A. 8, 1943), *cert. denied*, 88 L. Ed. (Adv. Op.) 119 (1943) ... 18

Webster v. *U. S. I. Realty Co.*, 170 Minn. 360, 212 N. W. 806 (1927) ... 24

Wilson v. *United States*, 221 U. S. 361 (1911) ... 33

Woolley v. *United States*, 97 F. (2d) 258 (C. C. A. 9, 1938) ... 13, 29, 32

Constitution, Statutes and Rules:

Page

Constitution
- Art. III 34, 36
- Fourth Amendment 33, 34, 36
- Fifth Amendment 33

Fair Labor Standards Act, § 9, 29 U. S. C. § 209 ... 9, 11, 12, 13, 17, 32

Federal Trade Commission Act, § 9, 15 U. S. C. § 49 9

Securities Act of 1933, 15 U. S. C. § 77a *et seq.*
- § 2(1) 4, 21
- § 4(1) 20
- § 5 ..... 2, 4, 5, 15, 20, 30, 31
- § 17(a) 2, 4, 5, 15, 20, 30, 31
- § 19(b) 2, 28, 29, 30, 34, 35
- § 20(a) 3, 4, 14
- § 20(b) 3
- § 22(b) 1, 5, 9, 15, 34
- § 23 2
- § 24 15

Walsh-Healey Public Contracts Act, 41 U. S. C. §§ 35-45 .. 8, 11, 12

18 U. S. C. § 582 15

28 U. S. C. § 647 29

Rules of Civil Procedure
- Rule 34 13
- Rule 37(b) 13

Rules of Practice, C. C. A. 9, Rule 19, par. 6 28

Miscellaneous:

132 CCH Stocks and Bonds Law Service 21

Note (1936) 36 Col. L. Rev. 683 22

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE PENFIELD COMPANY OF CALIFORNIA, a corporation,
Appellant,
v.
SECURITIES AND EXCHANGE COMMISSION,
Appellee.

No. 10487

Brief for Appellee

STATEMENT OF JURISDICTION

This is an appeal from a final order and decree entered by the District Court for the Southern District of California, Central Division, on June 1, 1943 (R. 313-17), pursuant to Section 22(b) of the Securities Act of 1933 (15 U. S. C. § 77v(b)).[1] That order directed the appellant to comply with a subpœna *duces tecum* of the Commission requiring it to appear before an officer of the Commission and to produce certain of its corporate books, papers and documents (R. 15-18).

---

[1] "In case of contumacy or refusal to obey a subpena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof."

STATUTE INVOLVED

In general, the Securities Act of 1933 affords protection to the investing public by requiring publicity of the material facts and circumstances bearing on the value of securities which are publicly offered through the mails or in interstate commerce.[2] Dissemination of information is achieved by the requirement that a "registration statement" describing the securities and the issuer be filed with the Securities and Exchange Commission, and by the further requirement that a "prospectus" summarizing the information contained in the registration statement be furnished to each person to whom the securities are offered. These requirements are found in Section 5 of the Act (15 U. S. C. § 77e). Section 17(a) (15 U. S. C. § 77q(a)) prohibits fraudulent sales of securities through the mails or in interstate commerce.

The Commission does not pass on the merits or value of any security (§ 23, 15 U. S. C. § 77w). Its function is to enforce the registration and anti-fraud requirements of the Act in order that the investing public may be afforded accurate and adequate information on the basis of which each investor may form his own judgment as to the merits of the securities offered to him.

Other sections of the Act make provision for the administration and enforcement of the substantive provisions of Sections 5 and 17(a). Thus the subpœna presently sought to be enforced was issued pursuant to Section 19(b) (15 U. S. C. § 77s(b))[3] in the course of an investigation insti-

---

[2] The Securities Act was last before this Court in *National Supply Co.* v. *Leland Stanford Junior University,* 134 F. (2d) 689 (1943), *cert. denied,* 88 L. Ed. (Adv. Op.) 43 (1943), and *Merger Mines Corp.* v. *Grismer,* 137 F. (2d) 335 (1943), *cert. denied,* 88 L. Ed. (Adv. Op.) 155 (1943). In both those cases the Commission filed briefs as *amicus curiæ.*

[3] "For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this title, any member of the Commission or any

tuted by the Commission under Section 20(a) (15 U. S. C. § 77t(a)).[4] On the basis of the information obtained through such investigations, the Commission is authorized by Section 20(b) (15 U. S. C. § 77t(b)) to institute actions in the District Courts to enjoin existing or threatened violations of the Act, and to place the facts it has obtained before the Attorney-General for criminal prosecution.

---

officer or officers designated by it are empowered to administer oaths and affirmations, subpena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing."

[4] "Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts."

FACTS

On May 14, 1942, the Commission issued an order under Section 20(a) directing an investigation to determine whether a Kentucky corporation called Bourbon Sales Corporation, together with several individuals, had violated Sections 5 and 17(a) of the Act in the sale of securities consisting of contracts for the bottling of whiskey (R. 8-11).[5] On October 15, 1942, the District Court for the Western District of Kentucky directed Bourbon Sales Corporation, in a proceeding similar to the case at bar, to comply with a subpœna of the Commission very like the subpœna directed against the present appellant. *S. E. C.* v. *Bourbon Sales Corp.*, 47 F. Supp. 70.[6]

The enforcement of that subpœna disclosed information which led the Commission into its present inquiry. It was discovered that the appellant here had for some time been acting as agent for Bourbon Sales Corporation in selling bottling contracts through the mails to persons to whom that company or the appellant had previously sold whiskey warehouse receipts (R. 160, 190-91, 201-03), and that it had subsequently sold its own bottling contracts through the mails in exchange for such receipts (R. 340, 342, affidavits of Andrew C. Elder, Viola M. Eldridge, A. W. Hudson, Mrs. Johnnie McKaskle, Peter P. Valley). While investigating this phase of the appellant's activities, the Commission learned also for the first time that *stock* of the appellant

---

[5] One of the respondents in that order was The Penfield Company, an Ohio corporation. It is not to be confused with The Penfield Company of California, the appellant here, which is a California corporation (R. 26).

[6] After holding that enforcement of the Commission's subpœna did not require a holding that the whiskey bottling contracts were securities within the meaning of Section 2(1) of the Act (15 U. S. C. § 77b(1)), the Court went on to decide that they were securities in the nature of investment contracts or certificates of interest or participation in a profit-sharing agreement within the meaning of that section. No appeal was taken in that case.

was being sold to the public through the mails in exchange for bottling contracts previously issued by either the appellant or Bourbon Sales Corporation (R. 204). On April 8, 1943, therefore, the Commission supplemented its original order of investigation to name the present appellant and A. W. Young, its secretary-treasurer, and to cover the sale of the appellant's stock by the persons named in the supplemental order (R. 12-15). Accordingly, the Commission is now proceeding to investigate whether the appellant and other specified persons have violated Sections 5 and 17(a) of the Securities Act in selling both stock and whiskey bottling contracts without registration and by means of untrue statements of material facts.

On April 9, 1943, the subpœna here involved (R. 15-18) was directed to the appellant and Young by C. J. Odenweller, Jr., Regional Administrator of the Commission's Cleveland Regional Office and one of the undersigned attorneys, who was designated in the Commission's orders authorizing the investigation as one of the officers empowered "to administer oaths and affirmations, subpœna witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda or other records deemed relevant or material to the inquiry" (R. 11, 15). The subpœna required the production of 20 specified items of the appellant's books, papers and documents covering the four-year period from May 1, 1939, to the date of the subpœna (R. 16-18).

When the appellant failed to comply with this subpœna, the Commission filed with the court below its application for enforcement under Section 22(b) of the Securities Act (R. 2-19), alleging that at the time of the entry of its orders of investigation it "had reasonable grounds to believe that Bourbon Sales Corporation and The Penfield Company of California had violated and [were] about to violate the provisions of Sections 5(a) and 17(a) of the said Act, as more fully appears in the said orders" (R. 4). After the appellant had filed an answer together with two supporting affidavits (R. 26-125), a hearing was held and the court

stated that "there should be some showing of relevancy, that is, that there is something about to be done or a probability of the violation of the Securities Law that is in the nature of a criminal violation for a Grand Jury investigation" (R. 127-28). Mr. Odenweller thereupon filed a statement concerning the materiality and relevancy of the items called for in the two subpœnas (R. 128-56), together with 19 supporting affidavits (R. 156-217). It appears from these affidavits that persons who had previously been sold whiskey warehouse receipts by either Bourbon Sales Corporation or the appellant were induced to turn over those receipts to the appellant in exchange for bottling contracts or stock; that the bottling contracts were offered or sold through the mails on the representation that the only way the receipt-holders could receive a profit would be by virtue of the skill of Bourbon Sales Corporation or the appellant and their ability to bottle and sell the whiskey with minimum expense and at the highest price; and that the stock was sold through the mails by means of literature which omitted to state its true book value and contained misrepresentations concerning the profit possibilities of the appellant (R. 160, 162, 190-93, 201-04, 340, 342, affidavits of Andrew C. Elder, Viola M. Eldridge, A. W. Hudson, Mrs. Johnnie McKaskle, Peter P. Valley).

After the filing of a supplemental answer and counter-affidavits by the appellant (R. 218-302), a further hearing was held (R. 304-10) and the court granted the Commission's application for enforcement of the subpœna (R. 331), incorporating in its final order and decree the twenty items which the subpœna specifies (R. 314-16). The court delivered no oral or written opinion specifying the grounds upon which the subpœna was enforced or ruling upon the appellant's several objections.

QUESTIONS PRESENTED

This brief seeks to establish the following propositions:

I. The Securities Act of 1933 authorizes the enforcement of the subpœna without a determination that the appellant has used the mails or an instrumentality of interstate commerce in the sale of a security; the only showing required of the Commission is that the evidence sought by the subpœna is not plainly irrelevant to any lawful purpose of the Commission in the discharge of its duties under the Act.

II. In any event there are reasonable grounds to believe that the appellant has used the mails and has done so in the sale of a "security."

III. The subpœna is valid in form and content: (A) the Act does not require the Commission to make a formal finding that in its opinion the evidence required is necessary for proper enforcement of the Act and relevant or material to the Commission's investigation, and (B) the evidence required is in fact relevant to the investigation.

IV. The subpœna is not unduly broad or burdensome and does not involve an unconstitutional search and seizure within the meaning of the Fourth Amendment.

V. The investigatory provisions of the Act do not involve an unconstitutional delegation of judicial power to the Commission.

ARGUMENT

I.

THE ACT AUTHORIZES THE ENFORCEMENT OF THE SUBPŒNA WITHOUT A DETERMINATION THAT THE APPELLANT HAS USED THE MAILS OR AN INSTRUMENTALITY OF INTERSTATE COMMERCE IN THE SALE OF A SECURITY.

The proposition that an administrative agency need not allege and prove its jurisdiction in seeking enforcement of a subpœna was established by the Supreme Court in *Endicott-Johnson Corporation* v. *Perkins*, 317 U. S. 501 (1943). In that case the Court held that the Secretary of Labor, in an investigation under the Walsh-Healey Public Contracts Act, was entitled to the enforcement of a subpœna upon a showing merely that the evidence sought was "not plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties under the Act" (317 U. S. at 509). The Supreme Court held further that the District Court was not "authorized to decide the question of coverage itself" and "had no authority to control her [the Secretary's] procedure or to condition enforcement of her subpœnas upon her first reaching and announcing a decision on some of the issues in her administrative proceeding" (*ibid.*). One of these issues to be decided by the Secretary rather than the District Court, the Supreme Court held, was whether the respondent's employees were covered by the Act—that is, whether they were employed in plants which were subject to the Secretary's jurisdiction under the statute.[7] In other words, the Secre-

[7] The Walsh-Healey Act requires that contracts with the Government for the manufacture or furnishing of materials in any amount exceeding $10,000 shall provide for certain minimum wages and maximum hours (41 U. S. C. §§ 35-45). The respondent opposed the enforcement of the subpœnas, insofar as they called for records concerning employees in plants of the respondent which manufactured articles that ultimately went into the finished product, on the ground that those plants were not within the coverage of the Act.

tary having issued a subpœna which was not "plainly incompetent or irrelevant," she was entitled to its enforcement without proving that the respondent's employees were in fact covered by the statute. A contrary ruling, the Supreme Court said,

> would require the Secretary, in order to get evidence of violation, either to allege she had decided the issue of coverage before the hearing or to sever the issues for separate hearing and decision. The former would be of dubious propriety, and the latter of doubtful practicality. The Secretary is given no power to investigate mere coverage, as such, or to make findings thereon except as incident to trial of the issue of violation (317 U. S. at 508).

It is the Commission's position that, if the Commission be substituted for the Secretary and the questions of use of the mails and sale of a "security" be substituted for the question whether a particular plant is covered by the Walsh-Healey Act, the *Endicott-Johnson* case governs the case at bar.

The *Endicott-Johnson* case has been deemed controlling by the First, Second and Fifth Circuits on the question of the necessity of proving interstate commerce under the Fair Labor Standards Act, whose provisions with respect to the enforcement of subpœnas are very similar to Section 22(b) of the Securities Act.[8] The First and Second Circuits,

---

[8] We here set out in parallel columns Section 22(b) of the Securities Act and the pertinent portion of Section 9 of the Federal Trade Commission Act (15 U. S. C. § 49), which is made applicable to the Administrator of the Wage and Hour Division of the Department of Labor by Section 9 of the Fair Labor Standards Act (29 U. S. C. § 209):

Section 22(b)	*Section 9*
"In case of contumacy or refusal to obey a subpena issued to any person, any of the said United States courts, within the jurisdiction of which said	"Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal

(Continued on next page)

(Continued on next page)

in affirming enforcement orders under that statute, have simply acted *per curiam* on the authority of the *Endicott-Johnson* case. *Martin Typewriter Co.* v. *Walling*, 135 F. (2d) 918 (C. C. A. 1, 1943); *Application of Holland*, 44 F. Supp. 601 (S. D. N. Y. 1942), *affirmed*, *Walling* v. *Standard Dredging Corp.*, 132 F. (2d) 322 (C. C. A. 2, 1943), *cert. denied*, 319 U. S. 761 (1943); see also *Walling* v. *American Rolbal Corp.*, 135 F. (2d) 1003 (C. C. A. 2, 1943). The court in the *Martin Typewriter* case quoted the following language from the District Court's opinion:

> This is an application to enforce a subpœna in what appears on its face to be an authorized and orderly investigation, and I do not feel justified in turning it into a lawsuit to decide a question which must be decided by the administrator in the course of his investigation, and which, if decided wrong, can be corrected later in a proceeding to enforce the orders of the administrator. (48 F. Supp. 751, 752.)

And the Fifth Circuit has stated:

> Convenience in most cases dictates that both "coverage" and "violations" be enquired about in a single investigation. It has just been decided, and we accordingly hold that in such investigations the investigating authority has generally the right to look first into either

---

Section 22(b)—Continued

person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof."

Section 9—Continued

to obey a subpœna issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

question, or into both concurrently. *Endicott-Johnson Corp.* vs. *Perkins,* 317 U. S. 501.

Mississippi Road Supply Co. v. *Walling,* 136 F. (2d) 391, 393-94 (C. C. A. 5, 1943), *cert. denied.* 88 L. Ed. (Adv. Op.) 32 (1943).[9]

Likewise, with one exception, all of the Circuit Courts of Appeals which had had occasion to consider the question prior to the Supreme Court's decision in the *Endicott-Johnson* case had reached the same result under several different statutes.[10] Only the Sixth Circuit Court of Appeals had taken the opposite view, *General Tobacco and Grocery Company* v. *Fleming,* 125 F. (2d) 596 (1942), and it is the Commission's position that that case must be deemed overruled by the Supreme Court's affirmance of the Second Circuit Court's opinion in the *Endicott-Johnson* case. Although the *General Tobacco and Grocery* case is not mentioned in the Supreme Court's opinion, certiorari was

---

[9] The District Court for the District of New Jersey has held that the Supreme Court's holding in the *Endicott-Johnson* case must be limited to the Walsh-Healey Act, which the Supreme Court referred to as "not an Act of general applicability to industry" (317 U. S. at 507). *Application of Walling,* 49 F. Supp. 659 (D. N. J. 1943). An appeal in this case is now pending. *Walling* v. *News Printing Co., Inc.* (C. C. A. 3, No. 8443). We believe, however, that the *Endicott-Johnson* case is not limited by that language. It was not so treated in Mr. Justice Murphy's dissenting opinion or in the cases cited above under the Fair Labor Standards Act.

[10] *President* v. *Skeen,* 118 F. (2d) 58 (C. C. A. 5, 1941); *National Labor Relations Board* v. *Barrett Co.,* 120 F. (2d) 583 (C. C. A. 7, 1941); see also *Fleming* v. *Montgomery Ward & Co.,* 114 F. (2d) 384 (C. C. A. 7, 1940), *cert. denied,* 311 U. S. 690 (1940); *Cudahy Packing Co.* v. *Fleming,* 122 F. (2d) 1005, 1009 (C. C. A. 8, 1941), *reversed on other grounds, Cudahy Packing Co.* v. *Holland,* 315 U. S. 785 (1942); *United States* v. *Clyde S. S. Co.,* 36 F. (2d) 691 (C. C. A. 2, 1929), *cert. denied,* 281 U. S. 744 (1930); *Cudahy Packing Co. of Louisiana, Ltd.* v. *Fleming,* 119 F. (2d) 209 (C. C. A. 5, 1941), *reversed on other grounds, Cudahy Packing Co. of Louisiana, Ltd.* v. *Holland,* 315 U. S. 357 (1942); *National Mediation Board* v. *Virginian Ry. Co.,* unreported, Pike and Fischer, Admin. Law, 44g.31-4 (E. D. Va., June 6, 1941).

granted because of a probable conflict between the Second and Sixth Circuits, and (as the Circuit Court of Appeals decisions subsequent to the *Endicott-Johnson* case indicate) the two cases are indistinguishable notwithstanding the fact that the *Endicott-Johnson* case involved the Walsh-Healey Public Contracts Act and the *General Tobacco and Grocery Case* involved the Fair Labor Standards Act.[11]

In any event, even if the *Endicott-Johnson* decision itself be limited to the statute there involved despite the several cases we have mentioned, we submit that the same reasoning underlying the holding that a subpœna of the Secretary of Labor under the Walsh-Healey Act is enforceable without proof of coverage leads with equally compelling force to the conclusion that a subpœna of the Commission under the Securities Act is enforceable without proof of use of the mails or the existence of a "security." The philosophy of the *Endicott-Johnson* doctrine is exhaustively expounded in Judge Frank's opinion for the Second Circuit Court of Appeals which the Supreme Court affirmed. *Per-*

---

[11] See also the following District Court cases in which the doctrine of the *Endicott-Johnson* case was applied to the enforcement of subpœnas under the Fair Labor Standards Act, both before and after the Supreme Court's decision in that case: *Fleming* v. *G & C Novelty Shoppe, Inc.*, 35 F. Supp. 829 (N. D. Ill. 1940); *Fleming* v. *Lowell Sun Co.*, 36 F. Supp. 320 (D. Mass. 1940), *reversed on other grounds, Lowell Sun Co.* v. *Fleming*, 120 F. (2d) 213 (C. C. A. 1, 1941), *affirmed*, 315 U. S. 784 (1942); *Fleming* v. *Howard A. Davidson Lumber Co.*, 3 Wage Hour Rep. 526 (E. D. Mich., Nov. 25, 1940); *Fleming* v. *Minnesota Mines, Inc.*, 4 Wage Hour Rep. 563 (D. Colo., July 18, 1941), *reversed on other grounds, Minnesota Mines, Inc.* v. *Holland*, 126 F. (2d) 824 (C. C. A. 10, 1942); *Application of Walling*, 50 F. Supp. 560 (S. D. N. Y. 1943); *Walling* v. *Belikoff*, 3 F. R. D. 92 (S. D. N. Y. 1943). Aside from the *News Printing Company* case, *supra* note 9, which is presently pending on appeal in the Third Circuit, the only District Court case to the contrary which remains unreversed is *Fleming* v. *Bank of America National Trust & Savings Association*, 5 Wage Hour Rep. 242 (N. D. Cal. 1942). That case was decided before the *Endicott-Johnson* case and no appeal was taken by the Wage and Hour Administrator.

kins v. *Endicott-Johnson Corp.*, 128 F. (2d) 208 (1942).[12] Essentially that philosophy is rooted in three well-known doctrines:

(1) The first of these is that, as in the case of a grand jury investigation, the scope of an administrative investigation is "not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning." *Consolidated Mines of California* v. *S. E. C.*, 97 F. (2d) 704, 708 (C. C. A. 9, 1938), quoting from *Blair* v. *United States*, 250 U. S. 273, 282 (1919).[13] This analogy between administrative investigations and grand jury proceedings has been made repeatedly by both this Court and others. *Woolley* v. *United States*, 97 F. (2d) 258, 262 (C. C. A. 9, 1938); *In re S. E. C.*, 84 F. (2d) 316, 318 (C. C. A. 2, 1936); *Endicott-Johnson* case, 128 F. (2d) at 214; *President* v. *Skeen*, 118 F. (2d) 58, 59 (C. C. A. 5, 1941); *S. E. C.* v. *Bourbon Sales Corp.*, 47 F. Supp. 70, 73 (W. D. Ky. 1942).

---

[12] Citations to particular portions of Judge Frank's opinion will be referred to herein as "the *Endicott-Johnson* case, 128 F. (2d) at ——."

[13] It was at least intimated in *Howat* v. *Kansas*, 258 U. S. 181, 186 (1922), that the doctrine of the *Blair* case—that a grand jury witness cannot resist a contempt citation for failure to respond to a subpœna by attacking the jurisdiction of the grand jury or the court over the subject matter of the inquiry—is applicable also to administrative proceedings. See the *Endicott-Johnson* case, 128 F. (2d) at 213, n. 10.

Cf. also *Fenton* v. *Walling*, 139 F. (2d) 608 (C. C. A. 9, 1943), where this Court held that, in a civil contempt proceeding under Rule 37 (b) of the Rules of Civil Procedure for failure to produce records pursuant to Rule 34 in injunctive proceedings under the Fair Labor Standards Act, the respondents could not raise the defense that their company had no employees engaged in interstate commerce.

Basically, therefore, the *Endicott-Johnson* doctrine is a particularization of this Court's position in the *Consolidated Mines* case, *supra*, 97 F. (2d) at 707:

> It appears to be the view of appellants that virtually conclusive evidence of a violation of the act must be in the possession of the Commission before an investigation can be ordered. If this were so there would be no point in conducting an investigation. The very purpose of the inquiry authorized by § 20(a), 15 U. S. C. A. § 77t(a), is to investigate the accuracy of information in the possession of the Commission tending to show a violation, and to aid the Commission in determining whether the facts justify injunction proceedings or the placing of the matter before the Attorney General for the institution of criminal prosecution.

An inquiry under Section 20(a) of the Securities Act necessarily has two purposes—to determine whether there is jurisdiction through use of the mails or an instrumentality of interstate commerce, and to determine whether a substantive violation of the Act has been committed by selling securities without registration or in violation of the anti-fraud provisions. As the Supreme Court pointed out in the *Endicott-Johnson* case, therefore, jurisdiction or coverage is as much an element of the administrative investigation as is any other factor. If a subpœna could be successfully resisted at the very threshhold of an investigation, the agency's statutory functions of investigation and enforcement could be effectively blocked. If the Commission were in a position to prove use of the mails and the sale of a "security" before proceeding with its investigation, there might well be no need for a subpœna at all, because the Commission would then have enough evidence to proceed, without further investigation, to institute an action for an injunction or to recommend criminal prosecution to the Attorney General.

(2) The second basis of the *Endicott-Johnson* philosophy is the policy against premature interference with the administrative process. All that is involved here is an investigation. Although it may result in the bringing of injunctive or criminal proceedings, it may likewise result in no

action whatever. The appellant will have its day in court in the event that an injunctive action is brought or an indictment is returned in due course by a grand jury. In any such action the Commission or the Government will have to establish through competent evidence the use by the appellant of the mails or some instrumentality of interstate commerce, as well as the sale by it of a security and every other element of the statutory offenses created by Sections 5 and 17(a) of the Act. To require such proof before giving the Commission a chance to investigate would put a premium upon the perpetration of fraud and severely handicap effectice enforcement of the Act. The case at bar is an example of the prolongation of litigation which occurs when respondents in an administrative investigation are permitted to litigate in a subpœna enforcement proceeding questions which go to the principal case. The subpœna in this case was issued on April 9, 1943 (R. 16). The court's order enforcing it was entered on June 1 (R. 316). This appeal is to be argued on March 31, 1944, and, by the time the Court's decision comes down, probably more than a year will have elapsed since the issuance of the subpœna. This postponement of the investigatory process is particularly serious in view of the fact that the statute of limitations on criminal prosecutions under Section 24 of the Act (15 U. S. C. § 77x) is three years (18 U. S. C. § 582) and there is no specific provision of law for tolling the statute pending the enforcement of a subpœna. "To be effective, judicial administration must not be leaden-footed." *Cobbledick* v. *United States*, 309 U. S. 323, 325 (1940).[14]

---

[14] The Congressional intention that the work of the Commission should not be subject to great delay in enforcing subpœnas is evident from the fact that Section 22(b) of the Securities Act calls for an "application" rather than a complaint and an "order" rather than a judgment—language which has been held to indicate that an application to enforce a subpœna is a summary proceeding to which the Rules of Civil Procedure do not apply: *Goodyear Tire & Rubber Co.* v. *National Labor Relations Board*, 122 F. (2d) 450 (C. C. A. 6, 1941); *Cudahy Packing Co.* v. *National Labor Relations Board*, 117

These considerations underlie the Supreme Court's holdings that a claim of lack of jurisdiction in the administrative agency is no ground for obtaining judicial review of an interlocutory order,[15] or an injunction against the continuation of the hearing or investigation.[16] If the same allegation of lack of jurisdiction could be litigated by resisting an administrative subpœna, the result sought unsuccessfully to be attained by interlocutory review or injunctive proceedings could be accomplished by indirection. In that event, as the Circuit Court of Appeals pointed out in the *Endicott-Johnson* case, 128 F. (2d) at 219, the defendants "would have discovered a way of 'running around the end' when blocked at the center." That the Supreme Court intended no such loophole in its earlier rulings is evident from its affirmance of that case. See also *Mississippi Road Supply Co.* v. *Walling*, 136 F. (2d) 391, 393 (C. C. A. 5, 1943), *cert. denied*, 88 L. Ed. (Adv. Op.) 32 (1943).

(3) The third basic doctrine underlying the *Endicott-Johnson* philosophy is the "presumption of legality [which] supports the official acts of public officers." *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1, 14 (1926). As the Supreme Court stated in that case (at 14-15), "in the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official

---

F. (2d) 692 (C. C. A. 10, 1941); see also *Endicott-Johnson* case, 128 F. (2d) at 226-27; *S. E. C.* v. *Clayton*, unreported, 1 S. E. C. Jud. Dec. 670 (D. D. C., March 16, 1939). This Court assumed in *Martin* v. *Chandis Securities Co.*, 128 F. (2d) 731, 734 (1942), that the Rules of Civil Procedure apply to the enforcement of a subpœna issued by an Internal Revenue agent, but in that case the agent contended that the rules applied and the question was not considered on the basis of an argument as to their inapplicability, as in the cases above.

[15] *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375 (1938); *Guaranty Underwriters, Inc.*, v. *S. E. C.*, 131 F. (2d) 370 (C. C. A. 5, 1942).

[16] *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938); *Johnson* v. *McNeill*, —— Fla. ——, 10 So. (2d) 143 (1942).

duties." See also *Mississippi Road Supply Co.* v. *Walling*, 136 F. (2d) 391, 394 (C. C. A. 5, 1943), *cert. denied*, 88 L. Ed. (Adv. Op.) 32 (1943), where the court stated, in applying the Supreme Court's decision in the *Endicott-Johnson* case to the enforcement of a subpœna under the Fair Labor Standards Act:

> If on the face of things a lawful inquiry is in progress, the court ought to assist it, assuming that the inquiring body will confine itself to its lawful functions. *Bradley Lumber Co.* vs. *N. L. R. B.*, 5 Cir., 84 Fed. (2d) 97. The burden indeed of showing that the inquiry is unlawful is upon him who is called on to show cause why a subpœna should not be obeyed. The presumption of regularity of the proceedings of public officers so places the burden, unless on the face of the proceedings they are unlawful or oppressive.

The *Endicott-Johnson* case by no means limits the court which enforces an administrative subpœna to a "routine ministerial function" as the appellant contends (R. 65). As the Supreme Court stated in *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41, 49 (1938), "to such an application [for enforcement of a subpœna], appropriate defence may be made." Thus, an application to enforce a subpœna may properly be resisted on the ground that a privilege of a witness, such as that against self-incrimination, would be violated;[17] or that the subpœna is unduly vague or unreasonably burdensome and hence involves a "fishing expedition;"[18] or that the subpœna was not issued by the person solely vested with that power;[19] or that the hearing is not of the kind authorized by the statute;[20] or, of course,

---

[17] *Boyd* v. *United States*, 116 U. S. 616 (1886).

[18] *Hale* v. *Henkel*, 201 U. S. 43 (1906); *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434 (1915); *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298 (1924).

[19] *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357 (1942).

[20] *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407 (1908); *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434 (1915); *Jones* v. *S. E. C.*, 298 U. S. 1 (1936); see also *Endicott-Johnson* case, 128 F. (2d) at 215, 219.

that it is plain on the pleadings that the evidence sought to be obtained by the subpœna is not germane to any lawful inquiry of the administrative agency.

It is clear, however, that it is no defense to say that the administrative agency has not affirmatively shown that there would be jurisdiction to sustain an ultimate action to enjoin or punish a violation of the particular statute under which the investigation is proceeding.

II

In Any Event There Are Reasonable Grounds to Believe that the Appellant Has Used the Mails and Has Done So in the Sale of a "Security."

The Eighth Circuit Court of Appeals, in a subpœna enforcement proceeding arising under the Fair Labor Standards Act after the Supreme Court's decision in the *Endicott-Johnson* case, has applied a burden midway between the *Endicott-Johnson* rule (that a subpœna should be enforced upon a showing merely that the evidence is "not plainly incompetent or irrelevant") and the burden previously announced by the Sixth Circuit in *General Tobacco and Grocery Company* v. *Fleming*, 125 F. (2d) 526 (1942) (that proof of interstate commerce is required). *Walling* v. *Benson*, 137 F. (2d) 501 (C. C. A. 8, 1943), *cert. denied*, 88 L. Ed. (Adv. Op.) 119 (1943).[21] We think this test is

[21] In *Consolidated Mines of California* v. *S. E. C.*, 97 F. (2d) 704, 706 (C. C. A. 9, 1938), this Court stated that it sufficiently appeared from the application and showing made in support of it "that the Commission was in possession of information affording reasonable grounds for the belief" that the respondent had violated the Securities Act. The question was not raised in that case whether any lesser burden would suffice, however, and the case was decided several years before the *Endicott-Johnson* case.

In *S. E. C.* v. *Bourbon Sales Corporation*, 47 F. Supp. 70 (W. D. Ky. 1942), which, as we have seen, arose out of the same investigation here involved, the court indicated that the Commission would have to show both jurisdiction and reasonable grounds for the belief that a violation had occurred or was

improper for the reasons stated in Part I above.[22] In any event, however, we believe that under any test we have established both that the appellant has used the mails and that it has sold a "security." *A fortiori*, we think we have shown that there are "reasonable grounds" for believing that the appellant has done so.

As to use of the mails, there is evidence in the record of mailings both in selling bottling contracts (R. 160, 203, 340, 342, affidavits of Andrew C. Elder, Viola M. Eldridge, A. W. Hudson, Mrs. Johnnie McKaskle, Peter P. Valley) and in selling stock (R. 204). As to the presence of a "security," [23] we have shown that the appellant's stock

---

threatened; but that case was decided before the *Endicott-Johnson* case and the court was, of course, bound by the holding of the Sixth Circuit in *General Tobacco and Grocery Company* v. *Fleming, supra* page 11. In fact, the District Court held in the *Bourbon Sales* case that it was not necessary to establish that the instruments under consideration were securities; and, since the *General Tobacco and Grocery* case, we believe, is no longer good law in view of the Supreme Court's decision in the *Endicott-Johnson* case, the same rationale followed by the court in the *Bourbon Sales* case as to the lack of necessity of proving the presence of a "security" would seem to apply equally to the lack of necessity of proving any use of the mails or an instrumentality of interstate commerce.

The only remaining case of which we know on this point is *S. E. C.* v. *Tung Corporation of America*, 32 F. Supp. 371 (N. D. Ill. 1940). Insofar as that case holds that the Commission in enforcing a subpœna must show reasonable grounds to believe that the respondents have been selling securities and using the mails or some instrumentality of interstate commerce, we believe it was incorrectly decided. *Cf.*, in that circuit, *Fleming* v. *Montgomery Ward & Co.*, 114 F. (2d) 384 (C. C. A. 7, 1940), *cert. denied*, 311 U. S. 690 (1940). No appeal was taken in the *Tung* case because the court did enforce the subpœna on the ground that the Commission had shown the existence of a "security."

[22] *Cf. Fleming* v. *Montgomery Ward & Co.*, 114 F. (2d) 384 (C. C. A. 7, 1940), *cert. denied*, 311 U. S. 690 (1940).

[23] As we have noted above (notes 6 and 21), it was held in the *Bourbon Sales* case, even though that court was bound at the time by the strict test of the Sixth Circuit as to the necessity of proving interstate commerce, that the Commission did not have to prove the existence of a "security" in order to obtain enforcement of its subpœna.

has been sold to the public through the mails.[24] Therefore, we are entitled under any test to enforcement of those items of the subpœna relating to sales of stock, without even demonstrating that the bottling contracts issued by both the appellant and Bourbon Sales Corporation are themselves securities.

We shall show, however, that the ruling of the District Court in the *Bourbon Sales* case that these same bottling contracts are securities was clearly correct. We express no opinion on the question whether or not the whiskey warehouse receipts for which the bottling contracts were exchanged are securities. That is a question which, if it becomes relevant, can best be decided in the light of facts to be elicited in the investigation. The appellant contends that the court erred in failing to rule that they were not securities (R. 319; Br., p. 56), but the Commission's case is not based on the assumption that they are, and we have not thus far contended that whiskey warehouse receipts *per se* are securities. Our contention is that the whiskey bottling contracts which were offered or sold to holders of those receipts, upon the representation that the appellant or Bourbon Sales Corporation would take care of all the details surrounding the taking of the whiskey out of bond and bottling and selling it and would see that the investor got a profit, are clearly securities within the definition of the term in the Act and the interpretation of that definition in a long line of cases.

---

[24] The appellant contends that it has issued only 500 shares of its capital stock; that that transaction was exempted from the registration provisions of Section 5 by Section 4(1) (15 U. S. C. § 77d(1)) as "not involving any public offering"; and that subsequent transfers of individually owned shares were exempted by the same section as "Transactions by any person other than an issuer, underwriter or dealer" (R. 27-28; Br., pp. 13-14). Even if this be assumed to be true, the Section 4(1) exemptions do not apply to the anti-fraud provisions of Section 17(a), which are likewise involved in this investigation. The Commission's supplemental order is directed at sales of the appellant's stock not alone by the appellant but also by the persons named in the order (R. 12-14).

In Section 2(1) of the Act (15 U. S. C. §77b(1)) Congress, following the pattern set by many state blue sky laws, did not restrict its definition of the term "security" to such orthodox forms as stocks, bonds, debentures or notes. Rather it provided a broad and flexible definition designed to extend the registration and anti-fraud provisions of the Act to the variegated schemes conceived by those who would circumvent the law. Under Section 2(1):

> The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, *certificate of interest or participation in any profit-sharing agreement*, collateral-trust certificate, preorganization certificate or subscription, transferable share, *investment contract*, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, *any interest or instrument commonly known as a "security,"* or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. (Italics supplied.)

The term "investment contract" particularly, which appears in thirty of the state acts,[25] has been construed in a long line of cases, both federal and state, as affording the investing public a full measure of protection, whether the transaction takes one of the more normal forms of a security or whether instead the promoter clothes it with the appearance of a transaction in some species of real or personal property. By emphasizing substance rather than form,[26]

---

[25] The state statutes are collected in 132 CCH Stocks and Bonds Law Service. Although we shall confine our discussion to proving that the whiskey bottling contracts are investment contracts, we believe they are also certificates of interest or participation in a profit-sharing agreement and interests or instruments commonly known as a "security."

[26] *S. E. C.* v. *Crude Oil Corporation of America*, 93 F. (2d) 844, 846 (C. C. A. 7, 1937); *S. E. C.* v. *Universal Service Association*, 106 F. (2d) 232, 237 (C. C. A. 7, 1939), *cert. denied*, 308 U. S. 622 (1940); see also *S. E. C.* v. *Wickham*, 12 F. Supp. 245, 247 (D. Minn. 1935); *S. E. C.* v. *Tung Corporation of*

the courts have construed the term to include any transaction where "the purchasers [look] entirely to the efforts of the promoters to make their investment a profitable one." *Atherton* v. *United States*, 128 F. (2d) 463, 465 (C. C. A. 9, 1942); *S. E. C.* v. *Universal Service Association*, 106 F. (2d) 232, 237 (C. C. A. 7, 1939), *cert. denied*, 308 U. S. 622 (1940).[27]

In short, whenever an interest in what is in substance a business enterprise is offered to persons who are led to expect that they will earn a profit through the efforts of the seller or some person other than themselves, it is immaterial that their shares in the enterprise may not take the customary form of stock or bond ownership. When those conditions are present, the substance controls the form, and a sale of a "security" in the nature of an "investment contract" occurs. Under this approach, a large variety of schemes purporting to involve a "sale" or "lease" of some

---

America, 32 F. Supp. 371, 374 (N. D. Ill. 1940); *S. E. C.* v. *Payne*, 35 F. Supp. 873, 877 (S. D. N. Y. 1940); *S. E. C.* v. *Bailey*, 41 F. Supp. 647, 650 (S. D. Fla. 1941); *United States* v. *Monjar*, 47 F. Supp. 421, 426 (D. Del. 1942), *appeal pending; People* v. *White*, 124 Cal. App. 548, 555, 12 P. (2d) 1078, 1081 (1932); *Prohaska* v. *Hemmer-Miller Development Co.*, 256 Ill. App. 331 (1930); *Kerst* v. *Nelson*, 171 Minn. 191, 195, 213 N. W. 904, 905 (1927); *Klatt* v. *Guaranteed Bond Co.*, 213 Wis. 12, 21, 250 N. W. 825, 829 (1933).

[27] This is substantially the formula which appears in almost all the "investment contract" cases. See *S. E. C.* v. *Wickham*, 12 F. Supp. 245, 248 (D. Minn. 1935); *S. E. C.* v. *Timetrust, Inc.*, 28 F. Supp. 34, 39 (N. D. Cal. 1939); *S. E. C.* v. *Pyne*, 33 F. Supp. 988 (D. Mass. 1940); *S. E. C.* v. *Payne*, 35 F. Supp. 873, 878 (S. D. N. Y. 1940); *S. E. C.* v. *Bailey*, 41 F. Supp. 647, 650 (S. D. Fla. 1941); *S. E. C.* v. *Bourbon Sales Corp.*, 47 F. Supp. 70, 72-73 (W. D. Ky. 1942); *State* v. *Gopher Tire & Rubber Co.*, 146 Minn. 52, 56, 177 N. W. 937, 938 (1920); *Moore* v. *Stella*, 52 Cal. App. (2d) 766, 778, 127 P. (2d) 300, 306 (1942); *Domestic & Foreign Petroleum Co.* v. *Long*, 4 Cal. (2d) 547, 555-556, 51 P. (2d) 73, 76 (1935); *Prohaska* v. *Hemmer-Miller Development Co.*, 256 Ill. App. 331 (1930); *Lewis* v. *Creasey Corp.*, 198 Ky. 409, 413-414, 248 S. W. 1046, 1048 (1923); *State* v. *Heath*, 199 N. C. 135, 139, 153 S. E. 855, 857 (1930); Note (1936) 36 Col. L. Rev. 683.

form of tangible property, and comprehending an arrangement by which the seller retains possession and control of the subject of the "sale" or "lease" with a view to earning a profit for the nominal owners or lessees, has been held to involve a sale of a security.[28] That the present case involves a

---

[28] Under the Securities Act of 1933 the term "investment contract" has been held to cover purported sales of:

Oil leaseholds: *S. E. C.* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344 (1943); *Atherton* v. *United States*, 128 F. (2d) 463 (C. C. A. 9, 1942).

Instruments denominated "bill of sale and delivery contract for—barrels of crude oil": *S. E. C.* v. *Crude Oil Corporation of America*, 93 F. (2d) 844 (C. C. A. 7, 1937).

Land for the development of tung trees: *S. E. C.* v. *Tung Corporation of America*, 32 F. Supp. 371 (N. D. Ill. 1940); *S. E. C.* v. *Bailey*, 41 F. Supp. 647 (S. D. Fla. 1941).

Silver foxes: *S. E. C.* v. *Payne*, 35 F. Supp. 873 (S. D. N. Y. 1940).

Chinchillas: *Hollywood State Bank* v. *Wilde*, unreported, Cal. Super. Ct. for Los Angeles (No. 478,973, Aug. 11, 1943) (civil action under both Securities Act and state blue sky law).

Conditional bills of sale for oyster half-shells to be planted on oyster bottom acreage: *S. E. C.* v. *Cultivated Oyster Farms Corp.*, unreported, 1 S. E. C. Jud. Dec. 672, CCH Fed. Sec. Law Serv., par. 90,121 (S. D. Fla., No. 350, March 22, 1939).

Undivided interests in specified fishing boats: *S. E. C.* v. *Pyne*, 33 F. Supp. 988 (D. Mass. 1940).

Under state blue sky laws the term "investment contract" has similarly been held to include purported sales of:

Muskrats: *State* v. *Robbins*, 185 Minn. 202, 240 N. W. 456 (1932).

Rabbits: *Stevens* v. *Liberty Packing Corp.*, 111 N. J. Eq. 61, 161 Atl. 193 (1932); *cf. Commonwealth* v. *Sofield*, 38 Dauphin County Rep. (Pa.) 233 (1933) ("certificate in or under a profit-sharing or participating agreement").

Chinchillas: *Hollywood State Bank* v. *Wilde*, *supra*, this note.

Land to be cultivated as a vineyard by a third party: *Kerst* v. *Nelson*, 171 Minn. 191, 213 N. W. 904 (1927).

Land to be developed by the vendee as a fig orchard: *State* v. *Agey*, 171 N. C. 831, 88 S. E. 726 (1916). (The North Carolina Blue Sky Law did not include the term "investment contract," but the defendant was held to be an "investment company" within the meaning of the statute.)

(Continued on next page)

purported *purchase* of whiskey represented by warehouse receipts previously sold seems irrelevant to the reasoning of these cases.

This line of cases has recently had its culmination in the first Supreme Court decision on the definition of the term "security" in the Securities Act of 1933. *S. E. C.* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344 (1943). The defendant acquired oil and gas leases on a 3,000-acre tract in Texas. The leases were acquired from a drilling contractor, and the principal consideration which the company gave the contractor for his leases was a contract to drill a test well. In order to finance the drilling, the company resold leases on small parcels of the acreage to the public in widely scattered parts of the country. The leases were in the form of the usual Texas oil and gas lease, with no collateral agreements of any kind in writing, but the sales literature assured prospective customers that the company was engaged in the drilling of a test well that would prove the entire tract.

The Supreme Court stated that, if the offers had omitted the economic inducement of the promised exploration well, the purchasers would have had no alternative except to test their own leases at a cost of $5,000 or more per well. In that event they would have been buying merely interests in real estate, as both lower courts had held. But the defendants, the Supreme Court stated (320 U. S. at 348), were "offered no such dismal prospect." The undertaking to drill a test well was "the thread on which everybody's beads were strung" *(ibid.)*. Without it none of the leases had any value. Therefore, the Court stated (at 349), "the purchaser was paying both for a lease and for a development project," and it "is clear that an economic interest in this well-drilling

---

(Continued)

Farm land to be paid for with the proceeds of crops planted by the vendor: *Prohaska* v. *Hemmer-Miller Development Co.*, 256 Ill. App. 331 (1930).

Option contracts for the sale of land: *State* v. *Evans*, 154 Minn. 95, 191 N. W. 425 (1922); *Vercellini v. U. S. I. Realty Co.*, 158 Minn. 72, 196 N. W. 672 (1924); *Webster* v. *U. S. I. Realty Co.*, 170 Minn. 360, 212 N. W. 806 (1927).

undertaking was what brought into being the instruments that defendants were selling and gave to the instruments most of their value and all of their lure." Hence the leases were "dealt in under terms or courses of dealing which established their character in commerce as 'investment contracts,' or as 'any interest or instrument commonly known as a "security" ' " (320 U. S. at 351).

The Supreme Court rejected also the argument that the offerings were beyond the scope of the Securities Act because the leases and assignments conveyed under Texas law interests in real estate. As to this the Supreme Court stated (320 U. S. at 352-53):

> In applying acts of this general purpose, the courts have not been guided by the nature of the assets back of a particular document or offering. The test rather is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect. In the enforcement of an act such as this it is not inappropriate that promoters' offerings be judged as being what they were represented to be.

This Court had previously come to the same conclusion in a criminal case under the Securities Act involving very similar facts. *Atherton* v. *United States*, 138 F. (2d) 463 (1942). In that case the Court stated (at 465):

> It is made clear in the indictment and in the proof that the purchasers looked entirely to the efforts of the promoters to make their investment a profitable one. The small leased acreage acquired by the individual purchaser was not itself susceptible of economic development, nor was the purchase made with the idea of independent exploitation. The leases were sold at prices ranging from $50 to $200 per acre upon the promise and representation that the proceeds of the sale would be used for bringing a well into production on the drill site, thus proving the productivity of the whole area under lease. It was proposed that when the well was completed the entire acreage, including the area selected as the drilling site, would be sold as one

unit, and that each purchaser of an assignment would receive a proportionate share of the purchase price. Clearly, the investor acquired more than a mere lease.[29]

The present case presents a clearer picture of a security than either the *Joiner* or the *Atherton* case.

In the first place, whereas the sale of a security in those cases had to be spelled out of the collateral representations exclusively, here the bottling contracts themselves contain agreements by the appellant or Bourbon Sales Corporation to bottle the whiskey represented by the whiskey warehouse receipts turned in for the bottling contracts, to sell the bottled whiskey and to pay to the contract-holders the proceeds less all expenses and a commisison of 10% of the gross sales price per case (R. 86, 88-89). This is aside from the fact that receipt-holders were influenced to accept bottling contracts in exchange for their receipts on the representations that that was the only way they could get their money back (R. 191-92, 202); that Bourbon Sales Corporation was "a large concern * * * formed to conduct business of this nature and was in the position to protect [their] interest and market the whiskey under an established trade name which would boost the price and make a better profit" (R. 202); that the appellant was in a "better position to know when [their] whiskey might age and be bottled and * * * would take the risk of loss" (R. 203); and that they would get "about double the amount [they] would by a sale of the bulk whiskey" (R. 203).[30] These contract provisions and

---

[29] Although the *Atherton* case was not cited in the Supreme Court's opinion in the *Joiner* case, the Commission's petition for certiorari in the latter case contended that there was a conflict between the *Atherton* case and the Fifth Circuit Court's opinion in the *Joiner* case.

[30] There is also evidence that representations that the appellant would arrange to bottle and sell the whiskey after four years of aging were made at the time the warehouse receipts were sold (R. 157). This indicates that the warehouse receipts were coupled with the bottling contracts in a scheme which as a whole involved the sale of a "security." We believe, however, that the sales of bottling contracts themselves in-

representations, as well as the fact that the contract-holders, being ordinary investors and not liquor dealers, would not have the facilities or the necessary federal and state liquor licenses (R. 96, 166) to take the whiskey out of bond and dispose of it, make it clear that they must look "entirely to the efforts of the promoters to make their investment a profitable one." *Atherton* v. *United States*, 128 F. (2d) 463, 465 (C. C. A. 9, 1942).

In the second place, the present case is stronger than the *Joiner* and *Atherton* cases also because it was represented here that there would be a pooling of the whiskey purchased by the appellant for bottling (R. 159-60). In other words, the scheme apparently did not envisage any rigid segregation of the whiskey sold to the company by each contract-holder, but contemplated that each holder, instead of obtaining the proceeds from the sale of the identical whiskey turned over by him, would actually get no more than a right to share in the avails of a mass of whiskey processed by the company. Although the cases we have cited demonstrate that this element of pooling is not essential to an "investment contract," it furnishes additional evidence of a common enterprise when it is present.

It follows under all the circumstances that the entire scheme involves in substance a speculative investment in a common enterprise necessarily contemplating complete reliance by the investor upon the appellant's efforts. Hence, (aside from the sales of its stock) the appellant has been selling securities both as agent for Bourbon Sales Corporation and as principal in the sale of its own bottling contracts.

We repeat, however, that, although we believe we have shown that the appellant has been selling securities through the use of the mails and certainly that there are "reason-

---

volved sales of securities, and that it is not a necessary element of a "security" that any particular representations were made at the time of the sale of the receipts—or even that the receipts were sold by the same company which sold the bottling contracts or by any affiliated or related company.

able grounds" for believing so, it is exceptional that we have been able to do so here before the conclusion of the investigation; and we respectfully submit that the order below should be affirmed on the basis of the doctrine of the *Endicott-Johnson* case and the other authorities and arguments we have assembled in Part I above. The very nature of the security involved in the sale of bottling contracts here, as well as the security involved in the *Joiner* and *Atherton* cases and the many others cited above (note 28), demonstrates how impracticable it would be to require the Commission to prove that what appears to be a transaction in tangible property is actually a sale of a security before it has had an opportunity to investigate the collateral representations and circumstances surrounding the transaction.

III

The Subpœna Is Valid in Form and Content.

A. *The Act Does Not Require the Commission to Make a Formal Finding that in Its Opinion the Evidence Required Is Necessary for the Proper Enforcement of the Act and Relevant or Material to the Commission's Inquiry.*

The appellant argues that the orders of the Commission which formed the basis of the application to enforce the subpœna in this case do not comply with Section 19(b) of the Act in that they do not specify any of the things sought by the subpœna and do not declare that "in the opinion of the Commission (these things) are necessary and proper for the enforcement of this title" and that the Commission "deems the particular documents and papers relevant or material to the inquiry" (Appellant's Br., p. 9).[31]

[31] We note in passing that the appellant's designation of points upon which it intends to rely on this appeal (R. 318-27) does not include this point, as required by paragraph 6 of Rule 19 of the Rules of Practice of this Court.

The short answer is that the Commission may delegate to its examining officer the authority to determine what matters are material to the inquiry, and that this Court has so held. In *Woolley* v. *United States*, 97 F. (2d) 258, 262 (1938), a case in which a conviction of perjury for giving false testimony in an investigation by this Commission was affirmed, this Court held:

> It is contended that the commission alone, under the provisions of the act, has authority to determine what matters are material to an inquiry, and that this authority cannot be delegated to the examining officer. The argument is based on the provisions of § 19(b), heretofore quoted [note 3, *supra*]. There is nothing in the language of the section to justify the argument. To adopt such interpretation would be to emasculate the provision relating to the appointment of examining officers, and require all proceedings to be conducted by the commission itself.[32]

As a matter of fact, there is an additional reason for so holding in the case at bar. Before deciding to file an application to enforce the subpœna, the Commission did obviously determine that the evidence required was both necessary and relevant. Thus, the Commission's application to enforce the subpœna alleges that the appellant has sold "certain securities, namely, contracts for the bottling of whiskey * * * and common stock" (R. 3), and that "All the books, records, documents, etc., described in the said subpœna duces tecum * * * were at the time of the issuance of the subpœna duces tecum and are now deemed by the Commission to be relevant and material to this inquiry" (R. 5). In addition, the application alleges that "At the time of the entry of the said orders [for investigation] the Applicant had reasonable grounds to believe that Bourbon

---

[32] Of course, since the procedure is governed by Section 19(b) of the Securities Act, the provisions of 28 U. S. C. § 647, cited by the appellant, have no application; they have to do solely with subpœnas to testify before a commissioner under a *dedimus potestatem*.

Sales Corporation and The Penfield Company of California had violated and [were] about to violate the provisions of Sections 5(a) and 17(a) of the said Act, as more fully appears in the said orders" (R. 4).

The appellant's contention that our position on this point violates the Fourth Amendment can be adequately answered by reference to the authorities cited below in Part IV of this brief.

B. *The Evidence Required Is in Fact Relevant to the Investigation.*

Section 19(b) of the Act authorizes the Commission or a designated officer to require the production of any books, papers or other documents "which the Commission deems relevant or material to the inquiry." As we have argued in Part I of this brief, it is our position that the only showing necessary is that the evidence specified in the subpœna is "not plainly incompetent or irrelevant to any lawful purpose" of the Commission. This showing has certainly been met and more; for the record demonstrates affirmatively that the evidence sought is relevant to a lawful inquiry—namely, a determination whether there have been violations of Sections 5 and 17(a) of the Act in the sale through the mails or in interstate commerce of securities of the appellant (both stock and bottling contracts), as well as bottling contracts of Bourbon Sales Corporation.

We do not deem it necessary to discuss extensively each of the twenty items specified in the subpœna (R. 16-18). The subpœna was carefully drafted along the lines of many similar subpœnas which have been issued by officers of the Commission in the day-to-day administration of the Act, and a glance at the twenty items should demonstrate that the records and files enumerated are essential to a determination whether a "security" has been sold and whether misrepresentations have in fact been made. Items 1, 4, 5, 6 and 14 specify the corporate books which we have found

essential as a starting point for any investigation under Sections 5 and 17(a) of the Securities Act—the minute book, general ledger, cash book, general journal and supporting journal entries. Those books are apt to indicate the general scheme of financing giving rise to the suspected violations, the receipts from the sale of securities, the company's financial position, and whether it will be able to carry out the commitments made in the sale of its securities. Items 2, 3, 10, 13 and 15 specify the stock books, stockholders' lists, correspondence files with stockholders, confirmations delivered in connection with sales of stock, and sales literature used in the sale of stock. All of these can be easily furnished and are obviously vital to an examination of the question whether Sections 5 and 17(a) have been violated by any of the persons named in the orders for investigation. Items 8, 9, 11, 13 and 16 specify similar records—and for a similar reason—with respect to the sale of bottling contracts of the appellant and Bourbon Sales Corporation. Items 7, 12, 17, 18 and 19 require records reflecting the sale of whiskey or whiskey warehouse receipts by the appellant, its cancelled checks, and purchase and sales invoices supporting the acquisition or disposition of whiskey or whiskey warehouse receipts or bottling contracts. This information is specified, of course, not because the Commission is concerned with the purchase or sale of whiskey or whiskey warehouse receipts as such, but because it is necessary in order to determine whether bottling contracts have been sold in violation of the Act; it may well throw light on the volume of bottling contracts sold, on the payments made to contract-holders upon the sale of their whiskey, and on the question whether in general there has been a scheme to defraud. Finally, Item 20 requires the company's employment records, which are needed in order to permit an examination to be made of the company's salesmen and other personnel.

The subpœna enforced in this same investigation by the District Court for the Western District of Kentucky in

S. E. C. v. *Bourbon Sales Corporation*, 47 F. Supp. 70 (1942), was very similar to the subpœna in the case at bar. Moreover, as we have already noted, this Court has stated that the scope of the Commission's investigations, like those of a grand jury, are "not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation." *Consolidated Mines of California* v. *S. E. C.*, 97 F. (2d) 704, 708 (1938). Along the same lines, this Court has stated also, in *Woolley* v. *United States*, 97 F. (2d) 258, 262 (1938), a perjury case arising out of an investigation by this Commission, that "The test of materiality is whether the false testimony has a natural tendency to influence the fact-finding agency in its investigation." That the evidence specified in the subpœna here may be expected to have such a "natural tendency" can hardly be gainsaid. If that criterion will support a conviction for perjury, surely it will support an order enforcing a subpœna issued in an investigation before any charges have even been preferred.[33]

IV

The Subpœna Does Not Involve a Violation of the Fourth Amendment.

The appellant argues that the court below erred in holding that the investigation was not a general, roving inquiry constituting an unreasonable search and seizure of

---

[33] See also *Walling* v. *American Rolbal Corp.*, 135 F. (2d) 1003, 1005 (C. C. A. 2, 1943), where the court stated, in affirming an order which enforced a subpœna issued under the Fair Labor Standards Act:

> In this instance the petition alleges violations of the Act which it is clearly the duty of the administrator to investigate. It may be that the refused records will not bear directly upon that subject but we cannot say they won't or that they won't supply needed information for use in checking other facts and records. As the administrator has not been shown to have abused his discretion in the selection of the records to be inspected we agree that the order below was without error.

its private papers and documents in violation of the Fourth Amendment (Br., pp. 20-27). We disagree.

All that the Fourth Amendment requires is that the demand be reasonably specific and limited to documents relevant to the inquiry. *Wilson* v. *United States*, 221 U. S. 361, 376 (1911); *Baltimore & Ohio Railroad Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 622 (1911); *Consolidated Mines of California* v. *S. E. C.*, 97 F. (2d) 704, 708 (C. C. A. 9, 1938); *McMann* v. *S. E. C.*, 87 F. (2d) 377, 379 (C. C. A. 2, 1937), *cert. denied*, 301 U. S. 684 (1937); *Newfield* v. *Ryan*, 91 F. (2d) 700, 702-3 (C. C. A. 5, 1937), *cert. denied*, 302 U. S. 729 (1937); *Cudahy Packing Co.* v. *Fleming*, 122 F. (2d) 1005, 1009 (C. C. A. 8, 1941), *reversed on other grounds*, *Cudahy Packing Co.* v. *Holland*, 315 U. S. 785 (1942); *Lowell Sun Co.* v. *Fleming*, 120 F. (2d) 213 (C. C. A. 1, 1941), *affirmed per curiam*, *Holland* v. *Lowell Sun Co.*, 315 U. S. 784 (1942). Our discussion above in Part III-B (pages 30-31) shows that this test is clearly met by the subpœna in the case at bar.

This case certainly does not present the type of "fishing expedition" condemned in the cases cited by the appellant or the cases enumerated in Part I of this brief (notes 17-20). Specifically, it is not at all like *Jones* v. *S. E. C.*, 298 U. S. 1 (1936), on which the appellant strongly relies; in that case the subpœna was not enforced because a majority of the Supreme Court held that the withdrawal of the registration statement being investigated had deprived the Commission of any authority to conduct an investigation for the purpose of determining whether a stop order should issue suspending the statement's effectiveness. Nor is the case of *Boyd* v. *United States*, 116 U. S. 616 (1886), of any assistance here, because that case holds simply that a subpœna is bad under the Fourth and Fifth Amendments where it violates the privilege against self-incrimination—a privilege which does not extend to a corporation.[34] The other

[34] *Wilson* v. *United States*, 221 U. S. 361 (1911); *Essgee Co. of China* v. *United States*, 262 U. S. 151 (1923). We do not understand that any privilege against self-incrimination is being argued here.

cases relied upon by the appellant are cases where the subpœna sought to be enforced was clearly too broad.[35]

V

The Investigatory Provisions of the Act Do Not Involve an Unconstitutional Delegation of Judicial Power.

The appellant contends that the court below erred in holding that the provisions of Sections 19(b) and 22(b) of the Act do not involve an invalid delegation of judicial powers to the Commission in violation of Article III of the Constitution (Br., pp. 28-55).

It is at least open to doubt whether the question of the statute's constitutionality can be raised by way of defense to an application to enforce a subpœna. See the *Endicott-Johnson case*, 128 F. (2d) at 213; *cf. Howat* v. *Kansas*, 258 U. S. 181, 185-86 (1922). The point need not be pressed here, however, in view of the fact that the constitutionality of the Securities Act is no longer open to question. *Coplin* v. *United States*, 88 F. (2d) 652, 656-57 (C. C. A. 9, 1937), *cert. denied*, 301 U. S. 703 (1937), and cases there cited; *Newfield v. Ryan*, 91 F. (2d) 700 (C. C. A. 5, 1937), *cert. denied*, 302 U. S. 729 (1937); *S. E. C.* v. *Crude Oil Corporation of America*, 93 F. (2d) 844 (C. C. A. 7, 1937). With particular reference to the delegation argument, see *McMann* v. *Engel*, 16 F. Supp. 446 (S. D. N. Y. 1936), *affirmed*, *McMann* v. *S. E. C.*, 87 F. (2d) 377 (C. C. A. 2, 1937), *cert. denied*, 301 U. S. 684 (1937); *S. E. C.* v. *Jones*, 79 F. (2d) 617 (C. C. A. 2, 1935), *reversed on other grounds*, *Jones* v. *S. E. C.*, 298 U. S. 1 (1936).

The appellant relies very strongly on an opinion written by Circuit Judge Field (as he then was) in 1887. *In Re Pacific Railway Commission*, 32 Fed. 241 (C. C. N. D. Cal.).

---

[35] Insofar as the basis of the appellant's argument of a violation of the Fourth Amendment is not the breadth of the subpœna but the fact that it was issued by an administrative agency rather than a court, see Part V below.

Judge Field there held (at 258) that the provision of a statute of 1887 authorizing the courts to enforce subpœnas issued by the Pacific Railway Commission, which had been created to investigate certain matters with respect to railroads receiving aid from the United States, involved an invalid delegation of judicial power. But that is no longer the law and has not been for fifty years. To cite now the holding of that case is to ignore fifty years of development in the field of judicial administration, including this Court's holding in *Consolidated Mines of California* v. *S. E. C.*, 97 F. (2d) 704 (1938). As long ago as 1894 the Supreme Court refused to sustain a similar attack against the provision of the Interstate Commerce Act comparable to Section 19(b) of the Securities Act. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447 (1894). The Court there held (at 474), in language equally applicable to federal regulation in the securities field:

> An adjudication that Congress could not establish an administrative body with authority to investigate the subject of interstate commerce and with power to call witnesses before it, and to require the production of books, documents, and papers relating to that subject, would go far toward defeating the object for which the people of the United States placed commerce among the States under national control. All must recognize the fact that the full information necessary as a basis of intelligent legislation by Congress from time to time upon the subject of interstate commerce cannot be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body, representing the whole country, always watchful of the general interests, and charged with the duty not only of obtaining the required information, but of compelling by all lawful methods obedience to such rules.

The appellant observes that courts have recently cited Judge Field's statement that "of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that

involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others" (32 Fed. at 250). No citizen of a democracy—least of all an agency of the Government whose members and officers are sworn to uphold the Constitution—can have any wish to quarrel with those sentiments. However, the right to be protected against unreasonable searches and seizures is adequately guaranteed by the Fourth Amendment; as the Supreme Court held in the *Brimson* case, there is no additional requirement that the subpœna be issued by a court rather than an administrative agency. The fact that Judge Field's ringing phrases as to the sanctity of the right against unreasonable search have been recently cited does not, of course, serve to revive the holding of the *Pacific Railway Commission* case. *Cf.* the *Endicott-Johnson* case, 128 F. (2d) at 218. Indeed, that language of Judge Field's was quoted by the Supreme Court in the *Brimson* case, the very case in which it refused to follow Judge Field's holding (154 U. S. at 479).

As the Second Circuit Court of Appeals has stated, in applying the *Brimson* case to this Commission, "Thus for years a procedure like that authorized for the Commission has been used by another government administrative body without question as to its validity." *In re S. E. C.*, 84 F. (2d) 316, 318 (1936). Again, when the *Endicott-Johnson* case reached the Supreme Court, the Court concluded its opinion with the statement (317 U. S. at 510):

> The subpœna power delegated by the statute as here exercised is so clearly within the limits of Congressional authority that it is not necessary to discuss the constitutional questions urged by the petitioner, and on the record before us the cases on which it relies are inapplicable and do not require consideration.[36]

[36] The brief filed by Endicott-Johnson in the Supreme Court argued (1) that denial to the court enforcing the Secretary's subpœna of the power to determine coverage violated the Fourth Amendment, and (2) that the decision of the Circuit Court of Appeals violated Article III of the Constitution.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

ROGER S. FOSTER,
Solicitor.

MILTON V. FREEMAN,
Assistant Solicitor.

LOUIS LOSS,
Special Counsel.

SECURITIES AND EXCHANGE COMMISSION,
18th and Locust Streets,
Philadelphia 3, Pa.

CHARLES J. ODENWELLER, JR.,
Regional Administrator.

SECURITIES AND EXCHANGE COMMISSION,
1370 Ontario Street,
Cleveland 13, Ohio.